

SUPREME COURT OF NOVA SCOTIA

Citation: *MacDonald v. NSTU Group Insurance Trustee*, 2025 NSSC 102

Date: 20250226

Docket: Ant No. 521704

Registry: Antigonish

Between:

Carolyn MacDonald

Plaintiff

v.

NSTU Group Insurance Trustee

Defendant

Decision on Motion to Exclude Expert Reports

Judge: The Honourable Justice Frank P. Hoskins

Heard: December 17, 2024, in Antigonish, Nova Scotia

Counsel: Melanie Young, for the Plaintiff
David Hutt, for the Defendant

By the Court:**Introduction**

[1] This is a motion brought by the plaintiff, Carolyn MacDonald, under Rule 55.10(2) of the *Civil Procedure Rules* for a determination of whether two proposed experts' reports sufficiently conform with the requirements of Rule 55 to permit the experts to testify at trial.

[2] The purpose of a motion under Rule 55.10 is to determine whether the impugned report sufficiently conforms to the formal requirements of Rule 55, not to determine admissibility. Further, the caselaw indicates that the motion should *not* be brought for tactical reasons. Rather, the party alleging that the report is defective is required to notify the party who filed it "in a reasonable time", allowing the deficiency to be addressed without impacting the trial timeline. That was not done in this case. The reports were filed more than four months before the motion was filed, which was little more than four months before the scheduled commencement of the trial.

[3] For the following reasons, I am not satisfied that the plaintiff has discharged the burden of establishing that either report does not sufficiently conform to Rule 55 such that it should be excluded.

Background

[4] The plaintiff was a recipient of Long-term Disability benefits from the defendant beginning in February 2021, after a diagnosis of ovarian cancer. For an initial two-year period she was entitled to benefits on the basis of being totally disabled from performing the essential duties of her own occupation. After two years, the policy definition of "totally disabled" applied a different definition of "totally disabled", encompassing "own occupation" as well as other occupations for which the member is qualified. The defendant's LTD plan is in the form of a trust fund, which is managed by Manulife Financial. Manulife employees case managers to adjudicate claims.

[5] The defendant ceased paying her LTD benefits in February 2023. Prior to this, the defendant had forwarded medical evidence provided by the plaintiff to internal consultants, specifically the two proposed experts: Heather Dawson, a Mental Health Specialist (MHS) employed by Manulife, and Dr. Richard Bruce Boyd, a physician

retained by Manulife as a Medical Consultant (MC). Each provided a report to a Manulife case manager. Whether these reports, neither of which was originally prepared for the purpose of litigation, sufficiently comply with the requirements of Rule 55 that they can be proposed for admission. The admissibility of the reports is not the issue here.

[6] The reports were each filed as expert reports on July 5, 2024. The plaintiff filed this motion on November 19, 2024, and it was heard on December 17, 2024. As of the date of the hearing, the trial was scheduled to commence on April 7, 2025.

Rule 55.10: Objection to Expert Report and Advance Ruling

[7] This motion is brought under Rule 55.10, which permits an advance ruling as to whether a report conforms to Rule 55.04:

55.10 Objection to report and advance ruling

(1) A party who receives a report and who wishes to have the opinion evidence excluded at the trial or hearing on the basis that the report does not sufficiently conform with this Rule must, in a reasonable time, notify the party who delivers the report of the deficiency.

(2) A party may make a motion for an order determining whether a report sufficiently conforms with this Rule to permit the purported expert to testify at a trial or hearing.

(3) An order under this Rule is binding at the trial of an action or hearing of an application only on the issue of conformity with Rule 55.04 or 55.05.

[8] In *Boyce v. Abousamak*, 2014 NSSC 160, Justice Rosinski considered the scope of a Rule 55.10 motion:

[25] When the new *Civil Procedure Rules* came into force on January 1, 2009, the rules regarding experts were radically redesigned. If the proposed expert opinions contain Rule 55-compliant written reports which were not contested, then, subject to few exceptions, the party presenting the expert evidence may not call that individual as an expert witness (although they may be called as a fact witness), but only provide them for purposes of cross-examination. Thus, the reports would speak for the expert witness as if they were the witness's direct examination.

[26] In conjunction with the new reality, the wording in Rules 55.10 and 55.15 suggests that advance rulings are not intended to deal with issues of admissibility of expert reports. These Rules included phrases such as, “whether a report

sufficiently conforms with this Rule to permit the purported expert to testify”, and “whether a narrative, initial narrative, or supplementary narrative contain sufficient information to permit a treating physician to testify to an opinion stated in the narrative without delivering an expert’s report”. These references suggest a concern about the form and content of written expert opinion, in contrast to a concern about the admissibility of those opinions.

...

[28] My sense is that “advance” rulings, in relation to the issue of the conformity of expert reports with the reporting requirements of Rule 55, are intended to address deficiencies at an early stage once they are brought to the attention of opposing counsel, such that the trial timeline is not disrupted.

[Emphasis added.]

[9] Similarly, in *Ferris v Scotia Life Insurance Company*, 2018 NSSC 216, Campbell J stated:

[7] A motion under Rule 55.10 is limited to determining whether the report complies with Rule 55.04 or Rule 55.05. It is not full review of the admissibility of the report or parts of the report. That is a function of the trial judge.

[8] That interpretation of Rule 55.10 is consistent with the wording of the rule and with the manner in which it has been applied. There are strong policy reasons for that position. The trial judge should make determinations that relate to weight and admissibility in order to avoid a multiplicity of proceedings. Decisions of that nature should be made in the context of the trial. That avoids having preliminary motions being made for tactical purposes. And it avoids having different appeal rights depending on whether the decision was made at an interlocutory stage or as part of the trial by the trial judge.

[9] It is up to the party seeking the exclusion of the report to show the manner in which it fails to comply.

[10] There is a distinction between the substance of the report and the formal requirements of Rule 55, as Campbell J noted in dismissing the motion in *Ferris*:

[10] The plaintiff asserts that the report does not define the medical terminology used. There is no requirement in Rule 55.04 to do that.

[11] The plaintiff says that the expert does not reference the medical record in forming his opinion. The report sets out the material facts upon which the report was based. If there are issues with what records the expert did review or failed to review, that would be a matter for cross-examination. Related to that is the

issue raised by the plaintiff that the report does not answer or address questions that the plaintiff maintains are relevant. Once again, those are issues for cross-examination and nothing in Rule 55.04 requires a report to address issues that the opposing party might raise.

[12] Finally, the plaintiff says that the report should be struck because it goes to the very issue to be determined in the case. That however is not an issue of compliance with the form set out in Rule 55.04. It is a substantive issue to be determined by the trial judge.

[13] The issues raised by the plaintiff on this motion under Rule 55.10 relate to the substance of the report, not to compliance with the formal content requirements set out in Rule 55.04.

[11] As a preliminary point, I will address the plaintiff's argument that Dr. Boyd's report should be excluded as a matter of court administration because it is partly handwritten.

Rule 82.06: Format of Document

[12] In addition to the objections under Rule 55.10, the plaintiff objects to Dr. Boyd's report pursuant to Rule 82.06, which states, in part:

82.06 Format of document

(1) A document authorized to be filed, or required to be delivered to a party, under these Rules must, in addition to conforming with a Rule about the content of the document, conform with each of the following:

(a) the document must be printed, or if it is permitted to be filed electronically it must be capable of being reproduced, on eight and a half by eleven inch paper;

(b) the document must have margins, spaces, upper and lower case, size and style of print or font, numbered pages, and a general organization that makes it readily readable;

(c) no backer is to be attached.

(2) The prothonotary may refuse to file a document that does not conform with the format requirements.

[13] Plaintiff's counsel submits that Dr. Boyd's report fails to comply with Rule 82.06(1) because it is handwritten. This Rule permits, but does not require, the

prothonotary to refuse to file a non-compliant document. Thus, I am not satisfied that it would be appropriate for the court to invoke this rule in respect of a document that was filed and *not* objected to under Rule 55 until several months before trial.

[14] Moreover, I am not satisfied that the rule renders a document, including a proposed expert report, non-compliant with formal requirements of the *Civil Procedure Rules* solely because it is handwritten. I note that Rule 82.05(5) provides:

5. The absence of authority to file a document does not imply that it cannot be exhibited to an affidavit or admitted as evidence.

[15] This rule empowers the prothonotary to reject non-compliant documents. It does *not* oblige the court to subsequently strike out a document for alleged non-compliance once a proceeding is under way.

Rule 55.04(1): Content of Expert's Report

[16] Rule 55 sets out the threshold requirements for an expert report. Certain attestations by the expert are required by Rule 55.04(1):

- (1) An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
 - (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;
 - (b) the witness is prepared to testify at the trial or hearing, comply with directions of the court, and apply independent judgment when assisting the court;
 - (c) the report includes everything the expert regards as relevant to the expressed opinion and it draws attention to anything that could reasonably lead to a different conclusion;
 - (d) the expert will answer written questions put by parties as soon as possible after the questions are delivered to the expert;
 - (e) the expert will notify each party in writing of a change in the opinion, or of a material fact that was not considered when the report was prepared and could reasonably affect the opinion, as soon as possible after arriving at the changed opinion or becoming aware of the material fact.

[17] Both reports at issue here include all the representations required by Rule 55.04(1). While plaintiff's counsel argued strenuously that the two proposed experts should be rejected at this stage on the basis that their connection to Manulife, which is retained by the defendant to manage the trust fund, render them unable or

unwilling to provide an objective opinion. The plaintiff has not provided authority suggesting that an employment or contractor relationship, or involvement by the expert in the relevant investigation, will automatically require exclusion of an expert's report. This is apparent from both the majority and concurring reasons in *Ontario (Natural Resources and Forestry) v. South Bruce Peninsula (Town)*, 2022 ONCA 315, at paras. 71-97.

[18] The plaintiff relies on *Ocean v. Economical Mutual Insurance Company*, 2010 NSSC 315, where Smith, A.C.J. (as she then was), ruled two reports inadmissible. This decision is clearly distinguishable on several grounds. The reports in that case were prepared by the plaintiff on her own behalf, claiming to be an “expert on her own life” (at para. 11). The decision was made under Rule 31.08(1) of the *Civil Procedure Rules (1972)*, not the then-new Rule 55 (at para. 16). Moreover, Smith A.C.J. questioned the propriety of determining admissibility – this was not a determination of threshold compliance, but of ultimate admissibility – prior to trial. She agreed to proceed on the basis that the parties agreed that they wanted a pre-trial decision on admissibility, and she was the trial judge (at para. 5). In my view, *Ocean* is of no application to this case.

[19] Similarly, I take the same view of the plaintiff's assertions about Dr. Boyd's involvement with the Canadian Life Insurance Medical Officers' Association.

[20] In my view the reports *sufficiently conform* to the requirements of Rule 55.04(1) that they should *not* be excluded at the preliminary stage on that ground.

Rule 55.04(2): Contents of Experts' Reports

[21] The contents of experts' reports are addressed in Rule 55.04(2) and (3):

- (2) The report must give a concise statement of each of the expert's opinions and contain all of the following information in support of each opinion:
 - (a) details of the steps taken by the expert in formulating or confirming the opinion;
 - (b) a full explanation of the reasons for the opinion including the material facts assumed to be true, material facts found by the expert, theoretical bases for the opinion, theoretical explanations excluded, relevant theory the expert rejects, and issues outside the expertise of the expert and the name of the person the expert relies on for determination of those issues;
 - (c) the degree of certainty with which the expert holds the opinion;

- (d) a qualification the expert puts on the opinion because of the need for further investigation, the expert's deference to the expertise of others, or any other reason.

[22] Dr. Boyd's report includes (as an addition to the Rule 55.04(1) representations) a list of the documents reviewed and relied upon in preparing his opinion. The steps taken in forming his opinion clearly consist of a review of the records provided by the case manager. His report as originally filed on July 7, 2024, was clarified in an affidavit filed on December 11, 2024, and on which he was cross-examined in the hearing of the motion. It consists of a first page which is the summary provided to him by the case manager, including the questions he was asked, and a three-page handwritten report giving his own opinion in response. These comments consist mainly of a summary of the plaintiff's cancer treatment based on the records provided, with brief remarks referable to each of the specific questions asked by the case manager. He concludes that the plaintiff's "treatment has been appropriate/excellent."

[23] Similarly, Ms. Dawson's report was prepared in response to a case manager's request, albeit asking simply "please provide comment/review"; the document itself is titled "Mental Health Specialist File Review." Ms. Dawson notes that she has been provided with "a brief narrative (21 Oct 2022) and clinic notes for a total of three appts 10 Feb/5 July/27 Sept 2022 (and labs, outside of scope for MHS to address interpret)." She goes on to review the materials, including noting that the narrative provided "does not provide clear medical evidence (**such as findings from mental status exam, cognitive testing, standardized symptom- or functional questionnaires, other validate measures**) to support an ongoing severity of the noted impairments in stress/tolerance/poor attention; no information is provided re psychiatric dxs or related treatment." She goes on to summarize the narrative and offer suggestions for next steps.

Rule 55.04(3): Necessary Information

[24] Rule 55.04(3) is concerned with information needed for assessing the weight to be given to an opinion:

- (3) The report must contain information needed for assessing the weight to be given to each opinion, including all of the following information:
 - (a) the expert's relevant qualifications, which may be provided in an attached resumé;

- (b) reference to all the literature and other authoritative material consulted by the expert to arrive at and prepare the opinion, which may be provided in an attached list;
- (c) reference to all publications of the expert on the subject of the opinion;
- (d) information on a test or experiment performed to formulate or confirm the opinion, which information may be provided by attaching a statement of test results that includes sufficient information on the identity and qualification of another person if the test or experiment is not performed by the expert;
- (e) a statement of the documents, electronic information, and other things provided to, or acquired by, the expert to prepare the opinion.

[25] Defence counsel noted in the hearing that Rule 55.04(3) cannot be mandatory in the sense of requiring every report to contain every element identified. Not every expert's report will require reference to outside literature, or a test or experiment, for instance. In this case, the experts have provided credentials as referenced in Rule 55.04(3)(a). Ms. Dawson's report refers to various online "mental self-help resources and supports" that she recommends as potentially valuable to the plaintiff. Both reports refer to the records that were provided (Dr. Boyd's report includes this as an addition to the Rule 55.04(1) representations).

Conclusion on Rules 55.04(2) and (3)

[26] In my view, the plaintiff has not established that the reports fail to conform to the requirements of Rules 55.04(2) or (3) such that either report should be excluded at this preliminary stage.

[27] While neither report is in an ideal form for an expert's report, reading Rule 55 in the most literal sense, plaintiff's counsel has not produced authority for the proposition that no report can comply with Rule 55 if it was originally prepared for some other purpose.

[28] The rules do not set a specific form for an expert's report. Thus, the content of the two reports has not been shown to be below the level of "sufficiently conforming", despite the unconventional form of the reports. Plaintiff's counsel says the defendant should have been expected to modify the reports in order to make them more facially compliant. However, this criticism cuts both ways. Rule 55.10(1) requires a party receiving an allegedly non-compliant report to, "in a reasonable time, notify the party who delivers the report of the deficiency." As Rosinski J. noted in *Boyce*, the purpose of this rule is "to address deficiencies at an early stage once

they are brought to the attention of opposing counsel, such that the trial timeline is not disrupted” (at para.).

[29] In my view, Rule 55.10 has not been complied with if the party objecting simply brings a motion without prior notice to allow the alleged defects to be remedied.

[30] Consequently, I am not prepared to exclude an expert report on a matter of form at this stage where the alleged deficiencies were not expressly brought to the attention of defendant’s counsel before the motion was brought, and where the reports have not been established to be insufficiently conforming to the requirements of the Rule.

Costs

[31] The parties shall have 30 days from the release of this decision to discuss costs. If they cannot come to an agreement I shall hear cost submissions.

Hoskins, J.